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NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1984

HELEN S. VANCE, ET AL.

Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY,
ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether petitioners, who have family buried in cemeteries on federal land, and who possess rights of reasonable vehicular access to those cemeteries, have standing to sue and have stated a cause of action sufficient to withstand a motion for summary judgment where the respondents have failed to provide, as promised and represented, reasonable vehicular access to the cemeteries so as to deny petitioners' reasonable access.

LIST OF PARTIES INVOLVED

Pursuant to the Rules of this Court, the parties to this proceeding in this Court are identical to the parties before the United States Court of Appeals for the Fourth Circuit.

TABLE OF CONTENTS

	PAGE
Question Presented	i
List of Parties Involved	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	7
Reasons for Granting the Writ	12
Conclusion	21
Appendix	22
Opinion of the United States Court of Appeals for the Fourth Circuit	1a
Published Decision of the United States Court of Appeals for the Fourth Circuit	3a
Notice of Appeal	28a
Judgment from United States District Court, Western District of North Carolina	30a

Memorandum of Decision of Honorable Woodrow W. Jones, Chief Judge..... 32a

Complaint filed in U. S. District Court..... 57a

Excerpts from the 1943-1948 Agreements..... 83a

Agreement of Transfer..... 87a

Cook letter from TVA..... 89a

Affidavit of Jack Prince..... 92a

Affidavit of Helen Vance..... 95a

Affidavit of Helen Vance..... 99a

Affidavit of Millie Marcus Vickery..... 101a

Affidavit of Millie Marcus Vickery..... 105a

Affidavit of Samuel Gray..... 107a

TABLE OF AUTHORITIES

Statutes and Federal Rules	Page No.
14 Am.Jur.2d 733, 747.....	16
18 C.J.S. §34.....	16
5 U.S.C. §701.....	16
5 U.S.C. §702.....	3
5 U.S.C. §706.....	4
28 U.S.C. §1254(1).....	2
28 U.S.C. §1331.....	2
28 U.S.C. §1361.....	6
Rule 12(b)(6), Federal Rules of Civil Procedure.....	12
Cases	
Benson v. City of Minneapolis..... 286 F.Supp. 614 (1968)	16
Board of Education of Central School District Number 1 v. Allen..... 88 S.Ct. 1923, 392 U.S. 236 (1968)	18
Federal Deposit Insurance Corporation v. Harrison.....	13, 14
Heckler v. Community Health Services of Crawford County, Inc..... 52 U.S.L.W. 4621, 4623 (1984)	20

U. S. v. Seagate, Inc..... 16
397 F.Supp. 1351 (1975)

United States Ex Rel TVA v.
Welch,..... 17,
66 S.Ct. 715, 716, 327 U.S.
546, 548, 549 (1946)

United States v. Georgia-
Pacific Company,..... 13
421 F.2d 92, (1970)

Vogel v. Supply Company and
Supply Company v. Developers,
Inc..... 17
277 N.C. 118, 117 S.E.2d 273
(1970)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO._____

HELEN VANCE; HENRY POSEY; GLENN ROGERS; LUTHER MYERS; ZENA FARLEY OLIVER; IVA M. TURNER; MILLIE VICKERY; JAMES C. MITCHELL; HELEN BIRCHFIELD; EVA ARRINGTON HALL; WILLA MAE TRULL; RUTH HICKS; ZULA CHRISTIE; JOE CABLE; EDNA HENRY; RUBY MARLOWE; DELLA BIRCHFIELD; MARY CABB YARBOROUGH; SAM CABLE; BARBARA PILKINGTON; CARL TIPTON; DAVID WELCH; ROY WELCH; PAULINE BALL; THEODORE HERRON; NANCY PILKINGTON,

Petitioners

v.

TENNESSEE VALLEY AUTHORITY; DEPARTMENT OF INTERIOR, (UNITED STATES OF AMERICA); JAMES WATT, SECRETARY OF THE INTERIOR; SWAIN COUNTY and THE STATE OF NORTH CAROLINA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Helen Vance, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Fourth Circuit entered in this proceeding on July 19, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto, as does the Judgment and Memorandum Decision of the United States District Court for the Western District of North Carolina.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 19, 1984. A timely petition for rehearing en banc was denied on September 17, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§1331. Federal question

The district courts shall have original jurisdiction of all civil ac-

tions arising under the Constitution, laws, or treaties of the United States.

United States Code, Title 5:

§702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. The United States may be named as a defen-

dant in any such action, and a judgment or decree may be entered against the United States: **provided** that any mandatory or injunctive decree shall specify the federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

United States Code, Title 5:

§706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant ques-

tions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonable delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be -

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to §556 and 557 of this Title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

United States Code, Title 28:

§1361. Action to Compel an Officer of the United States to perform his duty.

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

STATEMENT OF THE CASE

Petitioners are the heirs of deceased family buried in more than twenty private and public cemeteries on a 44,400 acre tract of land in Swain County, North Carolina (County). The Tennessee Valley Authority (TVA) acquired this tract by purchase and condemnation so as to erect a dam, watershed and reservoir known as Fontana Lake. On July 30, 1943, TVA entered into a contract with the Department of Interior (Interior), the County and the State of North Carolina (State). (See App. pp 83a). It provided, inter alia, that TVA would transfer the acquired lands to Interior's

National Park Service (Park Service) in order to shift its burden for the flooding of State Road 288. The contract further provided that Interior would construct a road around the north side of the lake pursuant to their "master plan" and that the State would construct a public road outside the Park connecting with the Park Road.

Two hundred sixteen families (several towns) including petitioners or their relatives, lived in this tract. They relied on State Road 288 to access their communities and the cemeteries. Because the road was to be flooded by the dam and because there would be some delay in the reopening of the area to the public, TVA approached the residents with the option of leaving the graves or moving them to another location upon condemnation. A letter dated July 31, 1943, accompanied the alleged "permit" which indicated that until the road was build that was proposed to be completed

sometime after the war, it would be necessary to walk a considerable distance to visit the cemeteries, and that others had already allowed their graves to remain. (See App. pp 89a). Jack Prince, a surveyor for the TVA during the period of acquisition, indicated that he and his 41 member team were instructed to tell the people that they could return to the land once the road was built. (See App.pp 92a). Relying on these representations, the petitioners or their relatives chose to leave the remains intact. The deeds of acquisition were made subject to the burial access rights of petitioners and others and Interior received the land subject to those access rights in 1948. (See App. pp 87a). If the master plan Park road had been completed along with the State Road, they would have provided access by way of motor vehicle to the cemeteries. In fact, the

State built their road and Congress appropriated $6,189,000.00 through 1972 for construction of the Park road, and 5.6 miles of the road was completed.

The cemeteries have been visited by the petitioners and their relatives since 1943. (See App. pp 99a, 105a). Regular maintenance and attendance at "decoration ceremonies" are an integral part of petitioners' Christian faith. (See App. pp 95a, 101a and 107a). Because individual attention was difficult, and because many cemeteries were several miles from where State Road 288 was flooded, the North Shore Cemetery Association was begun to encourage the preservation of the residents' heritage and to obtain reasonable vehicular access to the cemeteries. The Park Service refused assistance until pressured by the group. Only recently, a discretionary, complicated and burdensome access was instituted. It

was not until 1982 that petitioners learned that the neither the Park road nor any substitute vehicular access into the areas occupied by the cemeteries would ever be built.

As a result of the foregoing, petitioners filed an action in federal district court seeking equitable relief against the respondents for the protection of petitioners' constitutional, property and contractual rights in interest concerning vehicular access, of even a gravel road, to the cemeteries. Respondents moved for dismissal under Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. Petitioners amended their complaint, and the trial court entered a judgment against petitioners on November 14, 1983. Notice of Appeal was filed on November 16, 1983. (See App. pp 28a).

The Fourth Circuit affirmed the district court's judgment but on other

grounds, stating that the exculpatory appropriations clause of the 1943 agreement was implicitly incorporated into the letter of July 31, 1943, as well as in any and all representations or actions by government officials subsequent to that date. Chief Justice Winter dissented stating that an alternative action on the representations themselves as set forth in the complaint existed independent of the 1943 agreement.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION AND APPLICATION OF THE DOCTRINE OF EQUITABLE ESTOPPEL.

The Ninth Circuit indicates that Equitable Estoppel is the doctrine used to adjust the rights of parties according to good conscience. Four elements must be present: the party to be estopped must know the facts, he must intend that his

conduct shall be acted on or that the party asserting estoppel rightfully believed it is so intended; the latter must be ignorant of the true facts; and he must rely on the former's conduct to his injury. United States v. Georgia-Pacific Company, 421 F.2d 92, (1970). See also the Eleventh Circuit's definition and application in Federal Deposit Insurance Corporation v. Harrison, 735 F.2d 408 (1984).

The Fourth Circuit refused to apply this doctrine when it held that the exculpatory appropriations clause was implicitly incorporated into the letter of July 31, 1943. It then held that the construction of the Park road, and implicitly any vehicular access, was entirely contingent on these Congressional appropriations. Hence, if allegedly insufficient appropriations were made, the contract was not breached and the petitioners were therefore implic-

itly not entitled to any vehicular access.

In so holding, the Fourth Circuit, which raised the issue of equitable estoppel emasculated that doctrine by ignoring, through legal fiction, the fact that the petitioners were ignorant of the true facts. As Chief Justice Winter noted, the July 31, 1943, letter did not mention, explicitly or implicitly, the 1943 agreement. In Georgia-Pacific (p 98), the Company did not know that the government still held certain claims because there was no authority available that would indicate the contrary. Furthermore, the Ninth Circuit said, that the "government and its representatives even treated the order as binding". Likewise in this case no authority was available to petitioners to indicate that a road would not or could not be built. Moreover, the reason for the delay was the war effort, not the reasons now set forth by respondents. Furthermore, the In-

terior and the State began construction of the road and fully intended the project to be completed as in Georgia-Pacific.

The other elements of the Estoppel doctrine are met by the government's knowledge of the true facts (the contingency), its intention that the promise of a road assuring access to the cemeteries and the intimation of community cooperation would be acted on by the petitioners and that the petitioners rightfully believed that the road would be built without qualifications, and that petitioners relied upon respondents' representations and conduct to their injury (a non-vehicular, burdensome and tenuous access). Had the graves been moved, petitioners would have had access similar to the kind they had before the acquisition and transfer of the tract.

These conflicts justify the grant of certiorari to review the judgment below.

II. THE FOURTH CIRCUIT'S OPINION FORECLOSED CONSIDERATION OF PETITIONERS' CAUSES OF ACTION AS SET FORTH IN THE COMPLAINT.

The universal sentiment concerning a decent burial and access to the gravesite affords the basis for a cause of action. It is predicated upon theories of trespass, right to possession, tort, contract right or "purely personal" right. (See 18 C.J.S. §34; 14 Am.Jur.2d 733, 747). Standing can be secured under 5 U.S.C. §701 et seq., by showing a particular common-law wrong peculiar to the plaintiffs. Benson v. City of Minneapolis, 286 F.Supp. 614 (1968). The damage herein is the effective denial of reasonable access.

The petitioners have stated a cause of action based on contract. In North Carolina, a deed creating an easement by express reservation is also a contract. U.S. v. Seagate, Inc., 397 F.Supp. 1351, (1975).

Concerning the 1943-1948 agreements, the law in North Carolina as to third-party beneficiaries is synonymous with the Restatement categories of donee and creditor beneficiaries. Vogel v. Supply Company, and Supply Company v. Developers, Inc., 277 N.C. 118, 117 S.E.2d 273 (1970). Furthermore, this court in United States Ex Rel TVA v. Welch, 66 S.Ct. 715, 716, 327 U.S. 546, 548, 549 (1946) recognized that:

> Any solution had to take into consideration the interests of the United States, North Carolina and of Swain County, North Carolina, as well as the interests of the individuals affected". Welch at page 716 (emphasis added)

The petitioners are creditor beneficiaries and have alleged and shown such facts by virtue of the express incorporation of the cemetery access rights into the 1943-1948 agreements.

Petitioners have alleged and substantiated the religious nature of the cemetery

visits and assert that the burden on their access without a compelling reason to deny even a gravel road produces a coercive effect which operates directly against the petitioners and the practice of their religion. Board of Education of Central School District Number 1 v. Allen, 88 S.Ct. 1923, 392 U.S. 236 (1968). The petitioners have shown genuine issues of material facts in these instances, which have been presented particularly in the ambiguity of the exculpatory clause and its inclusion implicity throughout all the affairs of this transfer; hence, summary judgment should have been denied the respondents.

III. THE DECISION BELOW RAISES SIGNIFICANT AND IMPORTANT POLICY QUESTIONS CONCERNING CONDEMNATION PROCEEDINGS AND THE RIGHTS OF AFFECTED CITIZENS.

The Fourth Circuit's holding in this case of first impression imputes knowledge

of facts to citizens who are relatively unsophisticated and without resources or power to know the "true facts" of a transaction with the government. This strict, laissez faire'analysis is totally contrary to the current policy requiring disclosure of pertinent information within the private sector. The court's ruling effectively permits adhesion contracts when the government deals with massive projects such as the one in question. A line must be drawn somewhere.

Many people in this country value the regular and unimpeded visitation of their deceased loved ones with great intensity. Citizens expect, and in fact in many instances find, that the government expends great care in its management of cemetery affairs. However, the petitioners were not afforded the care and consideration one would expect of the government in matters of this intensely personal and deep rooted

nature. At best the parties and all those interested fully expected the road to be completed or concerning the exculpatory clause, the Interior and its TVA agents grossly misled petitioners or their relatives concerning access to the cemeteries. At worst it could be suggested that the government encouraged this signing of the permits to keep the cost of grave removal at a minimum.

Surely this is one of those cases, indicated by this Court in Heckler v. Community Health Services of Crawford County, Inc., 52 U.S.L.W. 4621, 4623 (1984) where the public interest, if any, in denying even the most meager vehicular access to the petitioners so as to insure the government freedom from the burden of estoppel, is outweighed by the countervailing interest that these citizens have in the graves of their loved ones and in receiving full disclosure from the government, and that to

hold otherwise would violate a minimum standard of decency, honor and reliability demanded of the government in its dealings with the citizens of this country.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

McLEAN & DICKSON, P. A.

By _____

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FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, hereby certify that on this 13th day of December, 1984, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petition for a Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

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Barbara E. Brown

A P P E N D I X

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 83-2105

Helen Vance, et al.,

Appellants

versus

Tennessee Valley Authority,

Appellees

Filed September 17, 1984

Appeal from the United States District Court for the Western District of North Carolina, at Bryson City. Woodrow W. Jones, District Judges

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Sprouse. Chief Judge Winter dissents.

For the Court,

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-2105

HELEN VANCE, ET AL.,
Appellants

vs.

TENNESSEE VALLEY AUTHORITY, ET AL.
Appellees

PUBLISHED

Appeal from the United States District Court for the Western District of North Carolina, at Bryson City. Woodrow W. Jones, District Judge. (C/A B-C-83-172)

Argued: April 4, 1984 Decided July 19, 1984.

Before WINTER, Chief Judge; HALL and SPROUSE, Circuit Judges.

Russell L. McLean, III (McLean & Dickson, P. A. on brief) for Appellants; James E. Fox, Associate General Counsel, Tennessee Valley Authority; Blake A. Watson, Land and Natural Resources Division, Department of Justice (F. Henry Habicht, II, Assistant Attorney General; Dirk D. Snel, Land and Natural Resources Division, Department of Justice; Herbert S. Sanger, Jr., General Counsel, Tennessee Valley Authority; Justin M. Schwamm, Sr., Assistant General Counsel Thomas C. Doolan; Joseph A. Pachnowski,

Pachnowski & Collins, P. A.; Charles M. Hensey, Assistant Attorney General, North Carolina Dpartment of Justice on brief) for Appellees.

HALL, Circuit Judge:

Plaintiffs appeal from the district court's order dismissing their suit against the Tennessee Valley Authority ("TVA") and various federal and state defendants for specific performance of alleged contractual rights and other injunctive relief. [1]/ We affirm, although on a different ground from the one cited by the district court.

I.

Plaintiffs are the heirs of deceased persons buried in twenty private and public cemeteries, which are located on a 44,400-acre tract of land in Swain County, North

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[1]/ In addition to TVA, the other defendants are the Department of the Interior, the Secretary of the Interior, Swain County, North Carolina, and the State of North Carolina.

Carolina (the "County"). This land was acquired by the United States in the 1940's through a combination of purchase and condemnation on behalf of TVA to erect a dam, watershed, and reservoir, known as Fontana Lake. TVA's acquisition was subject to outstanding burial and access rights to the property. The only road access to the cemeteries was obstructed in 1944 when State Road 288 was flooded by water impounded to form the reservoir.

Two hundred and sixteen families, which included plaintiffs and their relatives, lived in the area affected by the construction of the dam and reservoir and, before the flooding of the state highway, relied on this road access to visit the cemeteries. Before acquiring the land, TVA had approached th residents with a choice of either leaving the grave sites intact or having the remains reinterred at an alternative site at TVA's expense. Plaintiffs

and their relatives chose to leave the remains in their original location, claiming that they relied upon certain promises by TVA that the Department of the Intrior ("Interior") would construct a road to provide access into the area.

In 1943, TVA entered into a written contract with Interior, the County, and the State of North Carolina (the "State"), as a means of extinguishing TVA's liability for flooding the State highway. This contract provided, inter alia, that TVA would acquire from the private owners the entire 44,400 acres, using in part $100,000 contributed by the State, pay the County $400,000 to help satisfy its outstanding bond indebtedness for the flooded roads, and transfer the acquired lands to Interior's National Park Service ("Park Service") for inclusion in the Great Smoky

Mountains National Park ("Park"). [2]/ The contract further stated that Interior agreed to construct a road through the Park around the north side of the lake, and that the State would construct a public road outside the Park to connect with the Park road. These two roads would provide access by way of motor vehicle to the cemeteries in question.

Interior's obligation to build the Park road was, however, contingent on the appropriation of funds by Congress. Section 4 of the agreement stated in pertinent part as follows:

> The obligation of the Department [of the Interior] to construct or provide for the construction of a Park Road as defined in this Section 4 shall be subject to and contingent

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[2]/ The constitutional and statutory validity of TVA's actions was upheld by the Supreme Court in United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546 (1946).

> in all respects upon the appropriation by Congress of all funds necessary for such construction, and failure on the part of Congress for any reason to make such appropriations shall not constitute a breach or violation of this agreement by the Department or any other party hereto.

The 1943 contract was consummated in 1984 when TVA transferred the land to Interior with the express approval of the President of the United States.

The State built the access road to the Park line and Congress appropriated $6,189,000 through fiscal year 1972 for construction of the Park road. Three segments of the road, totaling 5.6 miles, were completed between 1963 and 1968. Due to serious difficulties encountered in constructing the road, including problems with the composition and formation of the of the underlying rock, the Park Service eventually determined that it was not environmentally or economically feasible to continue

the project, and no major work on the road has occurred since 1972. Nevertheless, plaintiffs allege that from 1943 until 1982, TVA and various federal and state officials promised that the Park road would be built to provide access to the cemteries and it was not until 1982 that plaintiffs were informed for the first time that no road access would be forthcoming.

Contending that they are third-party beneficiaries of the 1943 contract, plaintiffs brought suit in June, 1983, against TVA, Interior, the Secretary of the Interior, the County, and the State to compel construction of the Park road and to prevent the contracting parties from entering into a settlement agreement without providing for the construction of the road. In their complaint, plaintiffs also alleged that:

> [A]t the time of the acquisition of the land by purchase or condemnation, the acquisition

team of the TVA represented to the Plaintiffs or their heirs and others that access to the area purchased would be provided by a newly constructed road and produced copies of the [1943] contract between the government and the people of the State of North Carolina as an enticement or an inducement to sell their lands and insuring to them access to the area for the purposes of preservating [sic] ingress and egress to the cemeteries in the subject area. (emphasis added)

Plaintiffs further alleged that:

> [They] or their predecessors in interest and others were directly advised, promised, and represented that upon the transfer of their lands and property that their rights of access to the cemeteries would be protected and preserved by the road hereinabove referred to and upon such material representation, made transfer of their property to the Defendant, TVA, upon the contract and promise of the government to complete the road. The failure to construct the road as promised constitutes a material breach of contract upon which the Plaintiffs or their predecessors were enticed to conveyance by deed of their lands to the TVA and as such are entitled to a recision [sic] of the agreement and a return of the property to the grantors or their successors in interest. (emphasis added)

Finally, plaintiffs in an amendment to their complaint asserted that:

> Since 1944 and continuing up to and including 1981, the Defendants, and each of them, by and through their respective agents, representatives and employees, have continued by actions, conduct and inducements or promises stated, represented and held out to the Plaintiffs and others that the "Fontana-North Shore Road" would provide access into the area hereinabove described to the cemeteries where the Plaintiffs [sic] heirs are buried.

Plaintiffs alleged that the visits to and the maintenance and decoration of these cemeteries were a part of the practice of their Christian religious faith and that defendants' denial of road access to these grave sites constituted a deprivation of plaintiffs' freedom of religion in violation of the First Amendment to the United States Constitution. They requested the district court to order TVA to lower the water level in Fontana Lake below plaintiffs' previous access along State Road 288, or in the alternative, to require In-

terior to construct the Park road along the north shore of the lake so as to allow them free access by motor vehicle to the cemeteries. [3]/

Defendants denied liability for breach of contract or other wrongdoing and asserted that plaintiffs lacked standing to sue, had suffered no deprivation of constitutional rights, and were barred from seeking relief by the statute of limitations, laches, and public policy. Defendants moved to dismiss the action, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim, or in the alternative for summary judgment under Fed. R. Civ. P. 56. The district court dismissed the action, holding that plaintiffs were only incidental

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3/ Plaintiffs concede that the Park Service has provided them with boat access to the burial sites, but claim that such access has been infrequent, irregular, and a hardship, particularly for the elderly.

beneficiaries of the 1943 agreement and, as such, had no enforceable rights and no standing to sue under the agreement. Plaintiffs appeal.

II.

On appeal, plaintiffs contend that they have the requisite standing to sue for equitable relief under the 1943 contract and that they have alleged and demonstrated sufficient facts to withstand summary judgment. We conclude that whether or not they have standing to sue is immaterial, because we find that any agreement to construct a road was never breached.

In dismissing plaintiffs' action, the district court concluded that because the 1943 contract was not intended for the direct benefit of plaintiffs, they remained only incidental beneficiaries of the agreement without any right to seek relief for

breach of contract or specific performance. 4/

Although the district court's conclusion may well be correct, insofar as the 1943 written contract is concerned, it fails to address the standing plaintiffs may have to sue on the promises and inducements concerning the road's construction,

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4/ The district court reasoned as follows:

By the terms of the agreement TVA agreed in the name of the United States of America to commence and thereafter prosecute in a systematic, orderly, and diligent manner the acquisition by purchase, the exercise of eminent domain, or otherwise, the land identified as the 44,400, known as the "Fontana Addition". Since all of the land was to be acquired and made a part of the Park it is logical to assume that the parties to the agreement knew there would be no need for State Road 288. All of the residents of th area were to move out and the cemeteries were to be moved at TVA's expense unless the nearest surviving relatives elected to leave the remains in the remote areas. Thus the people who moved out would have no more rights to have the Park Road constructed than any other citizen. This would make the Plaintiffs and all other citizens merely incidental beneficiaries.

which were allegedly made by TVA and government representatives both at the time and aftr the written contract took effect. For example, plaintiffs allege that after the 1943 contract was signed, it was used by TVA as an inducement for plaintiffs and their relatives to sell their land. The record also reveals that on July 31, 1943, one day after the 1943 contract was entered into on July 30th, a letter was addressed by TVA to the next-of-kin of one of the persons buried in the affected area. The letter enclosed a "remain agreement," to be signed and returned if the addressee wanted the grave left undisturbed, and explained the altrnative procedure for reinterment at TVA's expense " [i]f it is your desire that the grave of your relative be moved to some neighboring cemetery which is accessible by road." This letter further stated as follows:

> The construction of Fontana Dam

> necessitates the flooding of the road leading to the Proctor Cemetery located in Swain County, North Carolina, and to reach this cemetery in the future [it] will be neessary to walk a considerable distance until a road is constructed in the vicinity of the cemetery, which is proposed to be completed after the war has ended. (emphasis added)

Nevertheless, even if these additional oral and written inducements provide plaintiffs the necessary standing to sue, they still cannot prevail. It is clear that these promises at least implicitly incorporated the provisions of the 1943 written contract between defendants TVA, Interior, the County, and the State, including the contingency of a congressional appropriation. 5/

5/ Even the letter dated July 31, 1943, cannot be construed as a direct promise to build the road independent of the provisions in the 1943 contract. Dated one day after the 1943 contract was entered into, the letter merely states that access to

Because the 1943 contract so clearly provided that Interior's obligation to construct a road was in all respects contingent upon the appropriation of all necessary funds, plaintiffs would never be able to demonstrate a breach of agreement. Nor was there any obligation for Interior to seek further appropriations. The contract specifically provided that "failure on the part of Congress for any reason to make such appropriations shall not constitute a breach or violation of this agreement by the Department or any other party hereto." (emphasis added). Thus, this is not a case where plaintifs could assert an estoppel-type argument against defendants

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the cemeteries will be limited until such time as the proposed road is constructed. Clearly this wording is a reference to the road proposed to be built in accordance with the terms of the just executed 1943 contract, including the requirement for congressional funding.

based on promises to construct this road. 6/

III.

Accordingly, we hold that the agreement to construct a road was never breached and for that reason, the district court's dismissal of plaintiffs' action must be affirmed.

AFFIRMED.

6/ Estoppel against the government is in any event not favored. As the Supreme Court has recently reiterated:

> [I]t is well-settled that the Government may not be estopped on the same terms as any other litigant. . . [although] we are hesitant, when it is unnecessary to decide this case, to say that there are no cases in which the public interest in ensuring that the government can enforce the law free from estoppel might be outweighed by the contervailing interest of citizens in some minimum standard or decency, honor and reliability in their deailings with their government.

Heckler v. Community H ealth Srvices of Crawford County, I nc., 52 U.S.L.W. 4621, 4623 (May 21, 1984) (footnotes omitted).

WINTER, Chief Judge, dissenting:

The district court dismissed plaintiffs' claims on the grounds that plaintiffs had no standing to sue on the 1943 agreement among the defendants. Although the majority does not pass directly on the correctness of that ruling, it does conclude correctly that the district court was in error in failing to address the question of whether plaintiffs had standing to sue on the promises and inducements concerning the construction of the road made by TVA and government representatives both before and after the 1943 agreement. Nonetheless, the majority concludes that plaintiffs' suit was properly dismissed because the promises and inducements alleged by plaintiffs "implicitly" incorporated the provisions of the 1943 agreement and that agreement was never breached. I disagree with those reasons, and I therefore respectfully dissent.

I.

Neither the plaintiffs' complaint nor affidavits accompanying it support the majority's conclusion that plaintiffs' claims rest solely on the 1943 agreement. In their third claim for relief, not referred to by the majority in its opinion, plaintiffs allege that they

> or their predecessors in interest and others were directly advised, promised, and represented that upon the transfer of their lands and property that their rights of access to the cemeteries would be protected and preserved by the road herein above referred to and upon such material representation, made transfer of their property to the defendant, TVA, upon the contract and promise of th government to complete the road. That failure to construct the road as promised constitutes a material breach of contract upon which the Plaintiffs or their predecessors were enticed to conveyance by deed of their lands to the TVA and as such are entitled to a recision of the agreement and a return of the property to the grantors of their successors in interest.

Nowhere in this claim for relief is reference made to the 1943 agreement. Rather, plaintiffs allege that they or their predecessors in interest were simply told by government agents, as part of the inducement to plaintiffs to convey their property to the TVA, that a road would be built. They thus advance a claim that, independently of any obligations that defendants may have had under the 1943 agreement to build an access road, defendants were obligated directly to plaintiffs to construct a road.

Plaintiffs' allegations in this regard are supported by affidavits and by the letter of July 31, 1943, cited by the majority, in which a TVA supervisor indicated that those wishing to visit cemeteries isolated by the proposed reservoir should have to walk "a considerable distance <u>until</u> a road is constructed . . . , which is proposed to be completed after the war has

ended. [1] Concluding as I do that

1/ The majority apparently believes that the letter itself indicated the contingent nature of the access road and was adequate to put the plaintiffs or their ancestors on notice of the provisions of the 1943 agreement making the federal government's obligation to build th road contingent on congressional action to fund it. I cannot agree. First, the letter does not even mention, explicitly or implicitly, the 1943 agreement. There is no indication in the letter that its representations rested upon or were made contingent by an intergovernmental agreement. Second, it seems to me that the letter indicated, in simple terms, that a road would be built, though it was proposed not to undertake construction until after the war. It is, of course, true that the letter indicated some uncertainty as to when exactly the road would be completed, but that is much different than contingency as to whether the road ever would be built.

Of course, the Department of the Interior has now decided not to build the road at all. I can only conclude that this eventuality was not suggested by the language of the letter, nor, quite possibly, by other representations made to plaintiffs or their ancestors by government agents, and thus that the federal government's present position with regard to construction of the road contravenes its earlier statements.

plaintiffs allege an independent obligation running to themselves from defendants to construct an access road that is independent of the 1943 agreement, I do not believe that plaintiffs' claims can be dismissed simply by finding that the 1943 agreement among defendants has not been breached. [2]/

II.

Even if it may correctly be decided

2/ I do not mean to suggest that on the basis of the present record an obligation independent of the 1943 agreement running from defendants to plaintiffs necesarily could be found. That would require further evidentiary development by the district court to determine the nature of any representations made to plaintiffs or their ancestors, by whom any such representations were made and whether the representations were within the authority of those making them, and the nature of plaintiffs' reliance. I merely rest my dissent on the fact that plaintiffs allege such representations and claim relief thereon, and that the majority's reliance on analysis of the defendant's obligations under the 1943 agreement thus does not adequately dispose of plaintiff's claims.

that all of plaintiffs' claims are founded on the 1943 agreement as incorporated into the other promises and representations made to plaintiffs, I also disagree with the majority's conclusion that there has been no breach thereof. The majority concludes that, since the 1943 agreement conditioned the Department of the Interior's obligation to build the road on appropriation of funds for the purpose by Congress, so long as Congress has made no such appropriation, there has been no breach. We were told in argument, however, that money for the road has not been appropriated not because Congress declined to do so, but because the Department of the Interior decided not to ask for the appropriation.

While the "availability of funds" clause included in the 1943 agreement may be adequate to preclude any obligation on the part of the federal government to provide funds for the road, it does not seem

to me that the clause can be read to relieve the Department of the Intrior of any obligation even to seek appropriations for the road. If the Department of the Interior had determined what appropriation was necessary to build the road and had placed that amount in budget requests and the request had been rejected by Congress, that would be a different matter. Where, as here, the Department on its own has determined to renege on the contract, however, there may be grounds for finding the Department to have failed to fulfill its contractual obligations. 3 I would

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3 I note that a request for funds for the road by the Department, unlike construction of the road itself, would not require specific appropriation by Congress. The exculpatory clause conditioning the government's obligation to build the road on Congress's appropriating money thus would not be relevant to establish a condition precedent to the Department's obligation to seek funds from Congress to build the road.

It seems that an obligation on the part of the Department to seek funds from

conclude that plaintiffs adequately allege a failure by the Department of the Interior to meet its obligations under the 1943 agreement.4

Thus I would conclude that summary dismissal of plaintiffs' complaint was not justified. I would reverse the judgment of the district court and remand the case for further proceedings.

Congress for the road was implicit in the contractual terms. Certainly undertakings of any type whatsoever by the executive would be rendered meaningless if we were to conclude that, upon a change of official position, the executive departments could with impunity reconsider on a contractual undertaking and never so much as seek to obtain adequate funding for it.

4 This conclusion does not rest on an estoppel theory. No reference outside of the 1943 agreement is necessary to establish that the Department of the Interior was obligated to seek funding for the undertakings agreed to in the contract. That obligation arises by implication from the language of the agreement. I thus do not believe that the line of decisions which have indicated that the government may not be estopped except possibly in the most extreme instances, e.g., Heckler v. Community Health Services of Crawford

County, Inc., 52 U.S.L.W. 4621 (May 21, 1984), Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947), are relevant to the proper resolution of plaintiffs' claims that are founded on the 1943 agreement.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants.

NOTICE OF APPEAL

FILED Nov. 16, 1983

Asheville, N. C.

U.S. District Court

Western District of N.C.

NOTICE is hereby given that the Plaintiffs except and appeal to the United States Court of Appeals for the Fourth Circuit from the findings of fact set forth in the Court's Memorandum of Decision and from

the Court's dismissal of the Plaintiffs' Complaint entered on the 10th day of November, 1983.

This the 15th day of November, 1983.

McLEAN & DICKSON, P. A.

/s/ RUSSELL L. McLEAN, III
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

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vs.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants.

J U D G M E N T

FILED Nov. 14, 1983

Asheville, N. C.

U.S. District Court

Western District of N.C.

THIS MATTER is before the Court upon the motions to dismiss filed by the Defendants and the Court has determined that the action should be dismissed for the reasons set forth in a Memorandum of

Decision entered simultaneously herewith.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendants' motions to dismiss be allowed and the action is hereby dismissed.

This the 10th day of November, 1983.

/s/ Woodrow W. Jones
Chief Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants.

MEMORANDUM OF DECISION

FILED Nov. 14, 1983

Asheville, N. C.

U.S. District Court

Western District of N.C.

This is a civil action brought by the Plaintiffs who contend that they are "direct, blood heirs of deceased individuals who are buried in certain cemeteries located upon a tract of land known as the

'Fontana Addition'" and that the Defendants are wrongfully obstructing or interfering with their right of free access to these cemeteries. The Defendants are the Tennessee Valley Authority (TVA); the Department of the Interior (United States of America); James Watt, Secretary of the Interior; Swain County and the State of North Carolina. The Plaintiffs seek injunctive relief and the "enforcement of contract rights." They allege that their ancestors are buried in some 20 private and public cemeteries located upon a 44,400-acre tract of land acquired by the United States of America through a condemnation proceeding on behalf of the TVA for the erection of a dam, reservoir and water shed, and that the impoundment of the water to form the reservoir, referred to as Fontana Lake, has flooded State Road 288, blocking and obstructing their only access by motor vehicle to the cemeteries. They further

allege that the TVA, the Department of Interior, Swain County and the State of North Carolina entered into a written contract dated July 30, 1943, wherein the Department of Interior agreed to construct a road through the Great Smoky Mountains National Park (Park) around the north side of the Lake, and the State of North Carolina would construct a public road outside the Park to connect with the Park road all of which would give the Plaintiffs access by way of motor vehicle to the cemeteries in question. The Plaintiffs concede that the State of North Carolina has built the access road to the Park line but they contend the Department of Interior has failed and refused to build the Park road and it has therefore breached its contract. They contend that they are third-party beneficiaries of the contract and desire to enforce such rights to compel the construction of the Park road and to prevent the parties

from entering into a settlement agreement without providing for the construction of said road. They allege that the maintenance of, the visits to and decorations of these cemeteries are a part of their practice of their religious faith and that the conduct of the Defendants in blocking access to these grave sites constitutes a deprivation of their freedom of religion in violation of the First Amendment to the Constitution of the United States. They seek a court order to compel TVA to lower the water level in Lake Fontana so that State Road 288 can be reopened or to force the Department of Interior to construct the Park road along the north shore of the Lake so as to allow them free access by motor vehicle to the cemeteries in question.

The Defendants have answered denying any breach of contract or other wrongdoing and moved to dismiss the action under Rule 12(b)(6), Federal Rules of Civil Procedure,

on the grounds that the complaint fails to state a cause of action upon which relief can be granted. The Defendants also assert that the Plaintiffs have no standing to bring this action and that if they do have standing their actions are barred by the statute of limitations or by laches. In the alternative the Defendants move for summary judgment under Rule 56, Federal Rules of Civil Procedure on the grounds that there is no genuine issue of material fact and that they are entitled to a dismissal of the action as a matter of law.

The Plaintiffs reply to the motions to dismiss or for summary judgment by moving to amend the complaint to allege that since 1944 and continuing up to and including 1982, they have been induced and led by the actions and conduct of the Defendants through statements and representations that the Park road on the north shore of the Lake would be built or other satisfactory

settlement of the controversy would be made and that statements and representations induced the Plaintiffs to delay bringing this action.

The Court heard arguments of counsel on the motions in Bryson City on September 19, 1983, and aftr considration of the pleadings, affidavits, and documents, briefs and arguments now enters its findings and conclusions.

In order to better understand the issues arising in this cause some background information is necessary. Three court opinions provide this background information and these facts are not in dispute. See Yarborough v. Park Commission, 196 N.C. 284, 145 S.E. 563 (1928); United States v. Welch, 150 F.2d 613 (4th Cir. 1945), and United States v. Welch, 327 U.S. 546, 66 S.Ct. 715, 90 L.Ed. 843 (1946).

On May 22, 1926, the Congress of the Unitd States enacted a statute now desig-

nated as 16 U.S.C.A. Section 403 creating the Great Smoky Mountains National Park consisting of approximately seven hundred and four thousand acres in North Carolina and Tennessee. The Act provided that the United States was not to purchase any of the land by appropriation of public moneys but that such lands shall be secured by public or private donations.

Shortly after the passage of this Act the State of North Carolina set up a corporation known as the North Carolina Park Commission, Public Laws 1927, Ch. 48, so that the State could avail itself of the provisions of the federal act. The corporation was an agency of the State and was given the power to issue bonds and to otherwise raise funds with which to acquire lands, by purchase and by condemnation for the purpose of deeding said lands to the United States in fee simple for the establishment of the Great Smoky Mountains

National Park. See Yarborough v. Park Commission, supra. The North Carolina Park Commission through the issuance of bonds and by a contribution by the Rockefeller Foundation acquired title to all other lands, except the 44,400 acre tract in question here and deeded it to the United States for the Park.

After the Park was established the Congress created the Tennessee Valley Authority for the purpose of maintaining and operating the Muscle Shoals Properties, improving navigation on the Tennessee River and for controlling floods in the basins of the Tennessee and Mississippi Rivers. 16 U.S.C.A. Section 831. Under the power granted to it by Congress the TVA constructed a large dam and reservoir on the Little Tennessee River in Western North Carolina known as the Fontana Dam and Reservoir. Between the reservoir and the Great Smoky Mountains National Park lie the

forty-four thousand four hundred acres of mountain lands upon which these private and public cemeteries are located. When the Congress authorized the building of Fontana Dam and Reservoir in 1942, H.Res. 1470, 77th Congress, 1st Session, two hundred and sixteen families occupied this land, and their only public means of ingress and egress was State Road No. 288 which was to be flooded by the reservoir. This situation posed a problem for the United States, the State of North Carolina and Swain County. The interest of the United States was that of the TVA and the National Park. The TVA interest was two-fold, first the 44,400 acres of land formed a part of the water shed of its reservoir and second, it had a statutory duty to help alleviate the hardships brought about by the construction of the dam and reservoir. The interest of the United States was also heightened by the fact that the 44,400 acre tract had been

included in the Great Smoky Mountains National Park project although not a part of the Park at this time. North carolina was interested because of its desire to include the entire tract in the Park and its obligation to furnish a public road system for its citizens which included the 216 families affected by the construction of the dam and reservoir. Swain County had issued bonds for the construction of State Road 288 prior to the State of North Carolina taking over the highway system of the State and part of these bonds were still outstanding.

The parties agreed to a solution of the problem. The Tennessee Valley Authority, the State of North Carolina, Swain County and the United States Department of the Interior entered into a written agreement dated July 30, 1943, which provided that the State would contribute $100,000.00 to the TVA which would ble used to help ac-

quire the land in the area and Swain County was to be paid the sum of $400,000.00 by TVA to help retire the outstanding road bonds and TVA was to transfer all the area to the National Park Service for inclusion within the Great Smoky Mountains National Park. The agreemnt was signed by the parties and approved by the Governor, Council of State and the General Assembly of North Carolina. See United States v. Welch, supra.

In the agreement the Department of Interior represented and stated that it had evolved a master plan for the development of the Park as extended by the addition of this tract, and that said master plan includes an "around the Park" road, of which the Park section of a projected road between Deals Gap and Bryson City constitutes an important link. Subject to the transfer by TVA to the Department of the Interior of the tract of land, the Department agreed

that, as soon as funds are made available for the purpose by Congress after the cessation of the hostilities in which the United States is now engaged, the Department will construct or cause to be constructed the sections of the road, collectively referred to as the "Park Road".

The agreement further provides that in lieu of the sections of road described in paragraphs (a), (b) and (c), the Department may at its election construct or cause to be constructed, as part of the Park Road, a continuous section of road beginning at a point on the Fontana Dam access road near the crossing of Fox Branch and extending around the aforesaid property of North Carolina Exploration Company (through existing Park lands) to the eastern boundary of the Park as extended by the acquisition of this tract. If and when funds are made available by the Congress for said Park Road, the location and type of said

road, the method of construction, and all standards and specifications therefor shall be determined by the Department in its sole discretion. However, the agreement did provide certain minimum standards for the roadway, and said roadway was to extend to the eastern boundary of the Park and connect with the road to be constructed by the State. The obligation of the Department to construct the road was contingent in all respects upon the appropria;tion by Congress of sufficient funds for such construction and the failure of Congress to appropriate such funds shall not constitute a breach or violation of the agreement by the Department.

The State agreed to construct a public road beginning at Bryson City, North Carolina and extending to the eastern boundary of the Park to connect with the Park Road. The evidence reveals that the State has constructed the State road from Bryson City

to the Park boundary line but the Department of the Interior has not constructed the Park Road.

In compliance with the agreement the 44,400 acre tract of land was acquired by the United States by purchase and condemnation on behalf of TVA and thereafter TVA, by a written document dated the 31st day of March, 1948, transferred the propety to the United States Department of the Interior, National Park Service.

At the time of the agreement and the transfer to the Park Service there were twenty-six cemeteries located upon the tract of land but one of them, Fairfax Public Cemetery, was not affected by the flooding of State Road 288. Four of the remaining twenty-five were subject to inundation and all graves were removed and relocated at TVA's expense. A fifth cemetery was relocated to the isolated area at the

express request of the nearest surviving relatives.

The remaining twenty cemeteries were left undisturbed on the tract of land. In each instance the nearest surviving relativ was contacted and given the option of(1) having the remains of their ancestor re-interred, at TVA's expense in other cemeteries of their choice or (2) having the remains left in the affected cemeteries undisturbed. Copies of the standard form agreement to be relocated in other cemeteries and the alternative agreement to have the remains left in the affected cemeteries are attached to the affidavit of Tom D. Waller, Assistant Chief of the Mapping Services Branch of TVA. These agreements expressly state that the cemeteries would be "isolated" by the impoundment of the reservoir, and the transmittal letters make it clear that no road access would be provided by TVA unless relocation

of the remains was chosen. This agreement and practice is standard policy with TVA.

The sole complaint advanced by the Plaintiffs in this action is that they have been denied access to these cemeteries by way of motor vehicle. It is not disputed that the cemeteries are intact and that the Plaintiffs and all other rrelatives and friends of the persons buried there may visit the grave sites as often as they like and care for and decorate the graves as they see fit, but they do not have access to the cemeteries by way of a road for motor vehicles. It was admitted that the Park Service furnishes the Plaintiffs and other relatives free boat transportation across Fontana Lake to visit the grave sites at specific times.

The Plaintiffs seek drastic remedies for the alleged wrongs inlcuding a mandatory injunction requiring TVA to lower the water level of Lake Fontana below State

Road 288 and permit them to use the road and all other roads in the area so that they may have free and unrestricted access to the cemeteries by motor vehicle. This demand is made notwithstanding the showing of TVA that to draw the lake level down below State Road 288 would result in the water level being below the water intakes to the turbines which produced 955,982 megawatt hours of electricity in 1982 at a direct cost of approximately $500,000.00. To replace this much electricity it would cost approximately $19,300,000.00 at TVA's fossil fuel plants.

In the alternative the Plaintiffs demand that the Department of Interior be required to build the "Park Road" as set forth in the agreement or that the Court set aside all of the original conveyances and transfers and return the property to the original owners or their heirs. Some of the arguments advanced by the attorneys

for the Defendants as to why the road should not be built are the enormous costs, in the millions of dollars, to build the mountainous road now and the controversy which would develop over building a road through this area which has been set aside by Congress as a wildrness area. The fight which would develop as environmentalists would take their fight to Congress and the courts and such controversy could last for a generation. If this occurred the Plaintiffs might not be around to enjoy their victory if they obtained one.

There is no genuine issue as to any material fact and these motions must be decided as a matter of law. Therefore, the matter is ripe for summary judgment.

The first issue for the Court's determination is whether the Plaintiffs have standing to bring and maintain this action against these Defendants.

The Plaintiffs claim the status of third-party beneficiaries with enforceable contract rights under the 1943 agreement.

The prevailing doctrine in the United States is that, with some qualifications, a third party for whose benefit a contract was made may sue thereon, even though he is a stranger to the contract and the consideration therefor. It has been said to be well settled that contracting parties may, if they intend to do so, validly extend a contractual benefit to a third part. 17A C.J.S. Contracts, §519(3), page 952. In Vogel v. Supply Co. and Supply Co. v. Developers, Inc., 277 N.C. 119, 117 S.E. 2d 273 (1970) the North Carolina Supreme Court held:

> . . . Nevertheless, there is general agreement that a third party may enforce a contract to which he was not privy but which was made for his benefit. See Annotation, Right of Third Person to Enforce Contract Between Others For His Benefit, 81 A.L.R. 1271.

> The American Law Institute's Restatement of Contracts provides a convenient framework for analysis. Third party beneficiaries are divided into three groups: donee beneficiaries, where it appears that the "purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary"; creditor beneficiaries, where "no purpose to make a gift appears" and "performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary"; and incidental beneficiaries, where the facts do not appear to support inclusion in either of the above categories. Restatement of Contracts § 133 (1932). While duties owed to donee beneficiaries and creditor beneficiaries are enforceable by them, Restatement of Contracts §§ 135, 136, a promise of incidental benefit does not have the same effect. "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." Restatement of Contracts § 147.

277 N.C. at 126-127.

The Court in Vogel further held:

> While North Carolina has never explicitly adopted the analytical framework of the Restatement, the principles applicable to incidental beneficiaries were noted in Chipley v. Morrell, 228 N.C. 240, 45 S.E.2d 129 (1947), and Trust Co. v. Processing Co. supra, (242 N.C. 370, 88 S.E.2d 233). Even so, the law

> in this State as to direct third party beneficiaries is synonymous with the Restatement categories of donee and creditor beneficiaries, Trust Co v. Processing Co., supra. Restatement § 133 correctly states the law of this State and we therefore expressly approve the Restatement formula.

The case of Trust Co v. Processing Co., supra, supports the proposition that a third person may sue to enforce a binding contract made for his direct benefit but not where the benefit to him is only incidental. In the case of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), the Supreme Court of the United States held:

> Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least, show that it was intended for his direct benefit. German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 33 S.Ct. 32, 35, 57 L.Ed. 195 (1912).

"A third person for whose direct benefit a contract was entered into may sue for breach thereof; but if the benefit is only

incidental, he may not." 12 Am.Jur., Contracts, Section 281.

It therefore become necessary for the Court to examine the facts of this case to determine whether the Plaintiffs are donee, or creditor beneficiaries or merely incidental beneficiaries of the agreement sought to be enforced by them.

The intention of the parties to the agreement is the determining factor in such an inquiry. "As a general proposition, the determining factor as to the rights of a third party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." 17 Am.Jur.2d., Contracts §304. It is not sufficient that the contract does benefit him if in fact it was not intended for his direct benefit. Robins Dry Dock & Repair Co. v. Flint,

supra.; King v. National Industries, Inc., 512 F.2d 29 (6th Cir. 1975); Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981).

At the time the contract was entered into by the parties 216 familites resided upon the 44,400 acre trct of land in question. By the terms of the agreement TVA agreed in the name of the United States of America to commence and thereafter prosecute in a systematic, orderly, and diligent manner the acquisition by purchase, the exercise of eminent domain, or otherwise, the land identified as the 44,400, known as the "Fontana Addition." Since all of the land was to be acquired and made a part of the Park it is logical to assume that the parties to the agreement knew there would be no need for State Road 288. All of the residents of the area were to move out and the cemeteries were to be moved at TVA's expense unless the nearest surviving relatives elected to leave the remains in the

remote areas. Thus the people who moved out would have no more rights to have the Park Road constructed than any other citizen. This would make the Plaintiffs and all other citizens merely incidental beneficiaries.

In the case of a government entity's contract, which could arguably confer rights on an indefinite number of people, the intention that liability will run to a third party must actually be expressed in the contract. Commonwealth of Pennsylvania v. National Ass'n of Flood Insurers, 378 F. Supp. 1339, 1347-49 (M.D. Pa. 1974), aff'd on other grounds 520 F.2d 11, 19 & n.17 (3rd Cir. 1975). The reason for this rule is apparent here where the four parties to the agreement intended to settle disputes and extinguish rights between the parties, not to create new rights in non-parties.

The Court holds that the agreement here was not intended for the benefit of

the Plaintiffs, any more so than any other citizen of the county and State. The Plaintiffs are merely incidental beneficiaries of the agreement and as such may not maintain an action for specific performance of its terms or seek relief for the breach of such terms.

It therefore follows that the Plaintiffs do not have standing to bring and maintain this action and the Defendants' motions to dismiss must be allowed.

A judgment dismissing the action will be entered simultaneously herewith.

This the 10th day of November, 1983.

/s/ Woodrow W. Jones
Chief Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

Plaintiffs,

v.

TENNESSEE VALLEY AUTHORITY, et al.

Defendants.

FILED Jun 1, 1983

Asheville, N. C.

U. S. District Court

Western District of N. C.

C O M P L A I N T

JURISDICTION AND VENUE

NOW COME the Plaintiffs, complaining of the defendants as follows:

1. This is a civil action seeking injunctive relief and enforcement of contract rights. This Court's venue is founded upon

28 U.S.C. §1391. Said acts complained of having occurred in the Western District of North Carolina, City of Bryson City, County of Swain.

THE PARTIES

The Plaintiffs

2. a. Helen Vance is a resident of the county of Graham, State of North Carolina.

b. Henry Posey is a resident of the county of Macon, State of North Carolina.

c. Glenn Rogers is a resident of Michigan.

d. Luther Myers is a resident of North Carolina.

e. Zena Farley Oliver is a resident of North Carolina.

f. Iva M. Turner is a resident of North Carolina.

g. Millie Vickery is a resident of North Carolina.

h. James C. Mitchell is a resident of the city of Marion, State of North Carolina.

i. Helen Birchfield is a resident of the city of Marion, State of North Carolina.

j. Eva Arrington Hall is a resident of North Carolina.

k. Willa Mae Trull is a resident of North Carolina.

l. Ruth Hicks is a resident of North Carolina.

m. Zula Christie is a resident of the City of Phoenix, State of Arizona.

n. Joe Cable is a resident of the city of Rockford, State of Tennessee.

o. Edna Henry is a resident of the county of Jackson, State of North Carolina.

p. Ruby Marlowe is a resident of the city of Marion, State of North Carolina.

q. Della Birchfield is a resident of the city of Marion, State of North Carolina.

r. Mary Cabb Yarborough is a resident of the city of Winston-Salem, State of North Carolina.

s. Sam Cable, is a resident of the City of Cayce, State of South Carolina.

t. Barbara Pilkington is a resident of North Carolina.

u. Carl Tipton is a resident of North Carolina.

v. David Welch is a resident of North Carolina.

w. Roy Welch is a resident of North Carolina.

x. Pauline Ball is a resident of North Carolina.

y. Theodore Herron is a resident of North Carolina.

z. Nancy Pilkington is a resident of the State of North Carolina.

The Defendants

3. a. The Defendant, Tennessee Valley Authority (TVA), is a public corporation created by a specific act of Congress with facilities in the State of North Carolina.

b. The Defendant, the Department of Interior, is a department of the United States Government and James Watt is the duly appointed Secretary of the Department of the Interior.

c. The Defendant, Swain County, is a body politic, existing by virtue of the laws of the State of North Carolina, and is represented by and through its commissioners, the Honorable James L. Coggins, W. T. Rolen, and Jack Smith.

d. The State of North Carolina is a constitutionally-created State, a Body

Politic and James B. Hunt, Jr., is the duly elected governor of the said State.

First Claim for Relief

4. The Plaintiffs, at the time of the filing of this complaint are direct, blood heirs of deceased individuals who are buried in certain cemeteries located on a tract of land known as the "Fontana Addition" and being that property described in an agreement of transfer between the Tennessee Valley Authority, US Department of Interior, and further, being that property described in an agreement entered into by and between the Tennessee Valley Authority, the US Department of Interior, Swain County, North Carolina, and the State of North Carolina, which property is described as follows:

> All that land, except that part hereinafter excluded, lying and being in Swain County, North Carolina, on the north side of the Little Tennessee and Tuckasegee Rivers, and south of the Great Smoky Mountains National Park, extending from Twenty Mile Ridge on the west to the divide between Lands Creek and Peachtree Creek on the east,

the east boundary of the area being approximately 2 miles west of Bryson City, North Carolina, the said area being bounded as follows:

(1) On the west and north by the present boundary line of the Great Smoky Mountains National Park;

(2) On the east by the divide between Lands Creek and Peachtree Creek (the nearest property line being the true boundary) but including the two tracts along the Tuckasegee River formerly owned by A. E. Lowe and A. L. and W. C. Nichols and acquired by the Authority from Nantahala Power and Light Company under tract designations FR-262 and FR-264;

(3) On the sound by proposed Fontana Lake (1710 contour) from the east boundary to a point on the edge of the lake approximately 2600 feet as measured along the shore (1710 contour) in a northerly direction from the axis of Fontana Dam; thence first with the north boundaries thence the west boundary of two tracts of land acquired by the Authority from Nantahala Power and Light Company and Carolina Aluminum Company, respectively, under tract designations FR-438 and FR-16 to a point 150 feet north of the center line of the principal access road to Fontana Dam and approximately 100 feet west of Lawellyn Branch; thence along a line parallel to and 150 feet north of said center line in a general westerly direction to an intersection with the boundary line of the Great Smoky Mountains National Park on the south

end of Twenty Mile Ridge and east of Twenty Mile Creek.
Excepting and excluding from the area above defined (1) all those lands owned by the North Carolina Exploration Company, consisting of some three or four tracts of land situated in the Eagle Creek and Myers Branch watersheds and containing approximately 1920 acres, more or less, and (2) all land upstream from Fontana Dam having the elevation of its present ground surface below the plane of the 1710-foot (m.s.l.) contour.

The above described land contains a net total of approximately 44,400 acres, more or less.

5. The cemeteries to which the Plaintiffs are seeking its access are listed and attached hereto as Exhibit A and made a part of this Complaint.

6. The property hereinabove described was acquired by the United States of America through a condemnation action brought about by the Tennessee Valley Authority to acquire a portion of the property lying below the 1710 contour of the above-described area, to erect a dam and reservoir, and in addition, the TVA represented to the courts

through its condemnation proceeding that the additional lands above the 1710 contour was being acquired for the purposes of presevation of the water shed and to further eliminate its obligations to the State of North Carolina and the public for blocking a State road into the described areas, and further, to provide by contract the construction of a new road for the benefit of the public to provide access into the area of taking.

7. That at the time of the acquisition of lands by purchase or condemnation, the acquisition team of the TVA represented to the Plaintiffs or their heirs and others that access to the area purchased would be provided by a newly constructed road and produced copies of the contract between the government and the people of the State of North Carolina as an enticement or an inducement to sell their lands and insuring to them access to the

area for the purposes of preservating ingress and egress to the cemeteries in the subject area.

8. Thereafter, by acquisition of the property through purchase or condemnation, the TVA did, in fact, acquire the lands and expressly reserved and excepted the county and state roadways within the subject property, and, in addition, excepted and reserved the cemeteries and burial rights as an express condition of the acquisition of the property. Attached hereto as Exhibit B and made a part hereof is the acquisition of the Tennessee Valley Authority for the area in question setting out the exceptions and reservations not acquired by the United States of America under this project.

9. At the time of the acquisition of the lands and prior to the construction of the TVA project known as the Fontana Project, the Plaintiffs, their heirs, family, and others had free, open, and unobstructed

access in and to the cemeteries set out in Schedule A and the areas wre recognized as cemeteries by the United States and the TVA at the time of the acquisition.

10. At the time of the acquisition of the lands upon and around which the cemeteries were located, the cemeteries had public access by State and County roads which were not and have not been acquired by the United States through its acquiring agency, TVA, as evidenced by Schedule B attached hereto and made a part of this Complaint.

The lands acquired by the United States excepted the rights of ways for State, County, and public roads, and at th time of the filign of this Complaint, have not been acquired by the TVA or the Department of the Interior. At the time of the acquisition of lands hereinabove set forth, the Plaintifs or their predecessors in interest were promised a North Shore Road,

which would provide access to the cemeteries. A copy of that agreement is attached hereto as Exhibit C and made a part hereof and incorporated herein by reference.

11. After the acquisition of the lands by the United States government, the government, by and through the Tennessee Valley Authority, impounded, blocked, and obstructed cemeteries by the construction and operation of Fontana Dam and Fontana Reservoir. By the completion of the Fontana Dam and impoundment of water, the lake has flooded State Road 288, blocking and obstructing Plaintiff's access to the cemeteries to which they have rights therein. The impoundment has continued to block access of the public rights of ways by the TVA.

12. After the blockage of access to the cemeteries, the United States government, by and through the TVA and the Department of Interior, breached its agree-

ment to construct the road as promised, even after the United States Congress has, at least on three occasions, appropriated funds necessary to construct the same. That the Department of Interior has used the money for other purposes not consistent with the appropriations. After the flood-age of the North Carolina State Road 288 and the cutoff of the Plaintiff's access, the State of North Carolina has attempted to comply with its portion of the contract and has built approximately six miles of road to the park boundary to the required specifications as established by the De-partment of the Interior. That since the time of the construction of the road by the State of North Carolina, numerous times the US Government and the State of North Caro-lina and others, have attempted through ad-ministrative channels to resolve the obli-gations to construct the Northshore Road as promised and resolve a dispute over the

breach of contract by the Department of Interior.

13. The Plaintiffs are being actually and constructively barred from reasonable access to and from its cemeteries, have been actually and constructively denied its public access to which it had prior to the impoundment of the lake and, as such, have no reasonable remedy at law in order to protect the rights and preserve the interests of the Plaintiffs and others to the public access as allowed by law. There is no remedy in law in which to proceed and as such, the Plaintiffs and others seek a mandatory injunction to remove the obstruction which has blocked their access to the cemeteries.

Second Claim for Relief

14. Now come the Plaintiffs and readopt and reallege paragraphs 1 through 13 of the Plaintiffs' First Claim for Relief as though more fully set forth herein.

15. That by virtue of the contract entered into by and between the TVA, Department of the Interior, Swain County, and the State of North Carolina, the parties have actualknowledge of the outstanding rights and interests being reserved to the Plaintiffs and others and had full knowledge of the rservations and exceptions of the road rights of ways and access in the hereindescribed property and, as such, the Plaintiffs and others were and are third-party beneficiaries of the contract to construct the North Shore Road as promised and are entitled as creditor-beneficiaries with direct rights of access as reserved in the deeds of conveyance to the United States of America and are entitled to specific performance of the contract by the Department of Interior to construct and complete the road agreed to.

Third Claim for Relief

16. Now come the Plaintiffs and re-

adopt and reallege paragraphs 1 through 13 of the Plaintiffs' First Claim for Relief as if fully set out herein.

17. That the Plaintiffs or their predecessors in interest and others were directly advised, promised, and represented that upon the transfer of their lands and property that their rights of access to the cemeteries would be protected and preserved by the road hereinabove referred to and upon such material representation, made transfer of their property to the Defendant, TVA, upon the contract and promise of the government to complete the road. That failure to construct the road as promised constitutes a material breach of contract upon which the Plaintiffs or their predecessors were enticed to conveyance by deed of their lands to the TVA and as such are entitled to a recision of the agreement and

a return of the property to the grantors or their successors in interest.

Fourth Claim for Relief

18. Now come the Plaintiffs and re-adopt and reallege paragraphs 1 through 13 of its First Claim for Relief and replead the same as if fully set out herein.

19. The Plaintiffs, as guaranteed by the United States Constitution, are entitled to practice their religious faith. That as such, maintenance of cemeteries and cemetery decorations are a part of their religious doctrine adn they are entitled to that freedom to worship as they so choose and believe. That the principals of their worship have been denied by the Department of Interior and James Watt, Secretary. The Plaintiffs and other have been both constructively and actually barred by the Defendants from reasnable access to their cemeteries to practice their religious beliefs and worship.

20. That there is no adequate remedy at law to provide for and allow the Plaintiffs and others to continue their practice of worship and belief, and as such, are entitled in equity to a temporary restraining order and mandatory injunction to allow the Plaintiffs and others to exercise their religious worship and practices without interference of the Department of Interior, Tennessee Valley Authority, the State of North Carolina, and/or Swain County.

The Defendants continue to impede, restrain, restrict, and prohibit the free, open, undisturbed and unobstructed access to the cemeteries which the Plaintiffs and predecessors are entitled, and had as blood relatives and ask the court to issue a mandatory injunction to remove the obstructions which prohibit their reasonable access, which they had prior to the construction of the Fontana Project. That at the time of the filing of this Complaint, the

State of North Carolina, is barring access to the Forney Creek Area by way of a barrier located at the tunnel on State Road 288. Swain County is attempting to negotiate a settlement without adequate provisions to provide Plaintiffs protection and freedom of exercise of their legal and religious rights.

That the TVA and the Department of Interior are barring the access by way of the impoundment of Fontana Lake and the failure to construt the North Shore Road as agreed and contracted for, to which the Plaintiffs seek a mandatory injunction to either remove the obstruction of Fontana Lake or to seek a mandatory compliance with the cntrct so as to provide access to the cemeteries which the agreement attached as Exhibit C would provide.

That the acts of the Defendants if allowed would interfere with the Plaintiffs' rights of worship, and the Plain-

tiffs have no adequate remedy at law to protect and preserve their rights.

Fifth Cause of Action

21. Now come the Plaintiffs and re-adopt and reallege paragraph 1 through 13 of its First Claim for Relief as if fully set out herein.

22. That the State of North Carolina and Swain County are hereby joined as party Defendants in order to adjudicate all the rights of the parties in that certain party Plaintiffs are residents of Swain County, and of the State of North Carolina and have a direct interest in seeing that the contract (Exhibit C) between the parties for the benefit of the Plaintiffs are complied with and that each party shall specifically perform all duties and obligations therein set out. That the Defendants, Swain County and the State of North Carolina are joined as party Defendants in order to bring before the Court all necssary parties to the

final determination of the respective rights and interest of each of the parties to the 1943 Agreement herein referred to. If the State of North Carolina and Swain County shall negotiate a settlement of its claim against the United States Government and the Tennessee Valley Authority without adequate provision for the rights of the Plaintiffs and other third parties, the Plaintiffs would be denied their rights of access and and religious worship and freedom. There is no adequate remedy at law and Plaintiffs seek in equity a temporary and permanent injunction to prohibit the Defendants, and each of them, from negotiating a settlement of the 1943 agreement without adequate provision for the rights and religious freedom of worship of the Plaintiffs and others.

WHEREFORE, having fully pled, the Plaintiffs seek as to their First Claim for Relief.

1. A temporary injunction restraining the Tennessee Valley Authority and the Department of the Interior from infringing upon the Plaintiffs' rights of free, open, public access to its cemeteries referred to in Exhibit B.

2. That they have and recover a mandatory injunction to order the Defendant, TVA, to lower Fontana Lake below the Plaintiffs previous access along the State Road 288 and to allow the use of the remaining state and county roads by the Plaintiffs into the areas which abutt the cemeteries set forth in Exhibit B.

3. That the Plaintiffs have as their Second Claim for Relief and recover as third-party beneficiaries the specific performance of the contract to provide direct rights of access to the cemeteries from which they have been excluded.

4. That the Plaintiffs have as their Third Claim for Relief, the Court declare a

material breach of contract by the Department of Interior and that a recision of the Agreement of Transfer be declared by the Court, and the property ordered returned to the grantors or their successors in interest.

5. Plaintiffs requst trial by jury.

6. That the Plaintiffs have for their Fourth Claim for Relief issue a mandatory injunction allowing the Plaintiffs to worship and practice their Christian faith and to allow them maintenance of their cemeteries and free access to the cemeteries to provide for decorations of their cemeteries as a part of their religious worship and to further order the Tennessee Valley Authority and Department of Interior to lower the Fontana Lake sufficiently below State Road 288 to allow free, open and undisturbed access by the Plaintiffs to the cemeteries in the area known as the North Shore to allow the Plaintiffs to exercise

their religious freedom without interference from the Department of the Interior, Tennessee Valley Authority or the State of North Carolina or Swain County.

7. That the Plaintiffs have as their Fifth Claim for Relief a temporary restraining Order and permanent injunction barring the Defendants, and each of them, from negotiating an agreement to settle the respective claims of the named Defendants without provisions for the claims of the Plaintiffs and the preservation ad protection of the Plaintiffs' access and rights to the cemeteries for their religious worship, and further that the Order provide that no settlement of the claims of the Defendants can be entered without provision in the settlement for reasonable cemetery access to the area known as the North Shore.

8. That the costs of this suit be taxed to the Defendants.

9. For a trial by jury.

10. For such other and further relief as may be deemed by the Court.

11. This the 25 day of May, 1983.

/s/ RUSSELL L. McLEAN, III
RUSSELL L. McLEAN, III
427 N. Main Street
Waynesville, N . C. 28786
(704) 452-2896
Attorneys for Plaintiffs

EXCERPTS OF EXHIBITS TO COMPLAINT

Exhibit A - List of graves north of Fontana Lake.

Exhibit B - List of acquisitions to private property - 44,400 acres with reservations and exceptions noted.

Exhibit C - Excerpts from the 1943-1948 Agreements

Exhibit D - Excerpts from the Agreement of Transfer between Tennessee Valley Authority and United States Department of the Interior National Park Service Relating to Lands in Swain County, North Carolina

EXCERPTS FROM THE 1943-1948 AGREEMENTS

THIS AGREEMENT, made and entered into as of the 30th day of July, 1943, by and between Tennessee Valley Authority . . . the State of North Carolina . . . Swain County . . . and the United States Department of the Interior . . . acting herein for the use and benefit of the National Park Service . . . .

WHEREAS, the reservoir to be constructed and operated by the Authority as a part of said Fontana Project will submerge, flood, or otherwise adversely affect a substantial portion of said Highway 288 east of the site of the Fontana Dam, together with other public roads connecting with said Highway 288; and

WHEREAS, the War Production Board has indicated that it would not approve or permit the reconstruction or relocation of said Highway 288 so long as the present War emergency and the shortage of labor,

materials, and equipment resulting therefrom continue to exist; and . . . .

WHEREAS, the acquisition of said land . . . by the United States of America and the inclusion thereof within the boundaries of the Park would serve to extend said boundaries substantially as originally contemplated, and would also establish a basis for the construction by the Department of a Park standard road over and across said lands; and

WHEREAS, the Department regards a Park standard road connection between Deals Gap and Bryson City as an important link in a planned "around the Park" road, has included the same as a part of a master plan for the development of the Park (extended as aforesaid), and, subject to inclusion of the aforesaid additional acreage within the Park area, is agreeable to initiating construction of the Park portion of such road as soon after the present War as funds are

made available therefor by Congress; . . . .

It is recognized and agreed that any or all of the lands acquired by the authority under this Section may be subject to outstanding rights of way, easements, and/or mineral rights; . . . .

The Department agrees to enter into an agreement or agreements of transfer with the Authority . . . pursuant to and subject to the provisions of such agreement or agreements, to accept an assignment and transfer of the lands described in Section 1 hereof, together with the additional rights of access and use . . . .

The obligation of the Department to construct or provide for the construction of a Park road as defined in this Section 4 shall be subject to and contingent in all respects on the appropriation by Congress of all funds necessary for such construction, and failure on the part of Congress

for any reason to make any appropriations shall not constitute a breach or violation of this agreement . . . .

Following completion of the Park road to be constructed by the Department subject to the provisions of Section 4, the Department may at its discretion bar said road to commercial use, and restrict the same solely to pleasure and tourist traffic.

At such time as the Department shall commence the construction of a Park road pursuant to Section 4 hereof, the State shall forthwith proceed to acquire good and sufficient easements and rights of way for, and shall construct, a road commencing at a point on U. S. Highway 19 in Bryson City, North Carolina, and extending to a point on the eastern boundary of the Park . . . .

AGREEMENT OF TRANSFER BETWEEN TENNESSEE VALLEY AUTHORITY AND UNITED STATES DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE RELATING TO LANDS IN SWAIN COUNTY, NORTH CAROLINA

THIS AGREEMENT OF TRANSFER, made and entered into this 31st day of March, 1948, by and between Tennessee Valley Authority . . . and United States Department of Interior for the use and benefit of the National Park Service . . . . TVA, subject to the conditions, exceptions and reservations hereinafter contained, hereby assigns and transfers to the Department for the use and benefit of the National Park Service as a part of the Great Smoky Mountains National Park the right of possession, control and all other right, title and interest which TVA may have in and to the following described lands: . . . .

(F) to such burial rights and rights

of ingress and egress in connection therewith as may be outstanding in third parties in TVA tracts numbers FR-494, 712, etc.

TENNESSEE VALLEY AUTHORITY

Maps and Surveys Division
Grave Removal Section
Bryson City, North Carolina

July 31, 1943

Mr. L. B. Cook
Marion
North Carolina

Dear Mr. Cooke:

The construction of Fontana Dam necessitates the flooding of the road leading to the Proctor Cemetery located in Swain County, North Carolina, and to reach this cemetery in the future will be necessary to walk a considerable distance until a road is constructed in the vicinity of the cemetery, which is proposed to be completed after the war has ended. We are informed that you are the nearest surviving relative of a deceased who is buried in this cemetery.

We have interviewed various relatives of the deceased who are buried in this

cemetery and they have requested that the graves of their relatives remain undisturbed. We are enclosing a remain agreement for the grave of yoru relative and if it is your desire that this grave be left undisturbed, please sign, filling in where possible the items checked in red and return in the enclosed franked envelope, postage not required. If it is your desire that the grave of your relative be moved to some neighboring cemetery which is accessible by road, please write us and we will immediately send you the propr papers to sign and the Tennessee Valley Authority will move this grave without cost to you and reinter it in any cemetery of your choice located in Swain County, provided we can secure permission to bury in that cemetery.

Your immediate attention to this matter will be appreciated and if there is any additional information you desire concerning

the above stated matter, please let us know.

Very truly yours,

TENNESSEE VALLEY AUTHORITY

/s/ H. H. Turner-Supv.
H. H. Turner - Supv M.L.D.
Grave Removal Section

HHT:CM
Enc.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants.

A F F I D A V I T

FILED Oct 11, 1983

Asheville, N. C.

U.S. District Court

Western District of N.C.

STATE OF NORTH CAROLINA

COUNTY OF HAYWOOD

The undersigned JACK PRINCE, who being first duly sworn, deposes and says:

1. That I am presently 77 years of age and living in Fontana, North Carolina.

2. That from 1941 until February, 1943, I worked as a surveying engineer for the Tennessee Valley Authority in Bryson City, North Carolina.

3. That I was a junior engineer doing surveys on the lands proposed for purchase by TVA, and which were later to become part of the Great Smoky Mountains National Park.

4. That I was instructed, as were the 41 other members of my team, to tell the people in the community and in the areas we were surveying for purchase that they were not to worry as they would have access to the area to be purchaed by way of the road that was to be built from Fontana to Bryson City. That we did, in fact, make such statements to these people in the area.

5. That I surveyed various cemeteries in this area to be purchased by the Ten-

nessee Valley Authority.

6. Affiant further sayeth not.

/s/ Jack Prince
JACK PRINCE

Subscribed and sworn to before me this 14 day of September, 1983.

/s/ Teresa E. Kuykendall
Notary Public, State of N.C.

My Commission Expires:

August 7, 1985

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants.

A F F I D A V I T

FILED Sept. 16, 1983

Asheville, N. C.

U.S. District Court

Western District of N.C.

STATE OF NORTH CAROLINA

COUNTY OF HAYWOOD

The undersigned Helen Vance, who being first duly sworn, deposes and says:

1. That I am a descendant and heir of Jake F. Cable, my father who sold (his, her, their) land to the Tennessee Valley Authority (TVA) in the 1940's.

2. That it is part of my Christian duty to take care and give respect to those, especially to members of my family, who have gone before me.

3. That from x (my personal observation) x (information and belief from relatives or others who personally observed) there were representatives from TVA who made statements to my father and his brothers indicating that after the acquisition of (his, her, their) land a road would be built from Fontana to Bryson City allowing road access for our family to the burial sites of our family.

4. That on x (my personal observation) x (information and belief from relatives or others who personally observed) my family was granted a right-of-way, or was

supposed to have been granted a right of way in the deed to the extent that our family would temporarily have only walking or water access to the family burial sites until the road from Fontana to Bryson City would be built.

5. That I have received promises, direct or indirect, from representatives of TVA, Congress and other government officials from approximately 1943 until 1982 that such a road which would in part allow us the access we were promised, was going to be built.

6. That at no time have I or others of my family abandoned our access rights in that I and others have continued to visit as best we can our family's graves despite the natural hardships.

7. That the temporary access to the burial sites that was provided in recent years by the government has never been acceptable as a permanent solution by me

and was meant only as a temporary resolution of the problem until the road was built.

8. That it was not until 1982 that I learned the road would never be built, or any reasonable facsimile, and therefore decided to seek a legal remedy to this problem.

9. Affiant further sayeth not.

/s/ Helen Vance

Subscribed and sworn to before me this 15 day of September, 1983.

/s/ Teresa E. Kuykendall
Notary Public, State of NC

My Commission Expires: August 7, 1985

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants.

A F F I D A V I T

FILED Oct. 11, 1983

Asheville, N. C.

U.S. District Court

Western District of N.C.

STATE OF NORTH CAROLINA

COUNTY OF HAYWOOD

1. I, Helen Vance, have the following relative(s) buried in the following

cemetery(ies):

Name of Relative	Relationship	Cemetery
Shufford Lae Cable	Brother	Cable
John B. Cable	Grandfather	Cable
Prudie Marcus Cable	Grandmother	Cable

2. That affiant further sayeth not.

/s/ Helen Vance
Affiant

Subscribed and sworn before me, this 29 day of Sept. 1983.

/s/ Jeanie Farmer
Notary Public

My Commission expires: 2/18/86

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants.

A F F I D A V I T

FILED Sept. 16, 1983

Asheville, N. C.

U.S. District Court

Western District of N.C.

STATE OF NORTH CAROLINA

COUNTY OF HAYWOOD

The undersigned, Millie Marcus Vickery, who being first duly sworn, deposes

and says:

1. That:

x a. I x (was an owner of property in Swain County, North Carolina), ___ (am a descendent and heir of one, _____who owned property in Swain County, North Carolina), and that this land was transferred to the Tennessee Valley Authority (TVA) in the 1940's.

x b. I have family buried in one or more cemeteries in the 44,000 acres acquired by the TVA in 1943.

2. That it is part of my Christian duty to take care and give respect to those, especially to members of my family, who have gone before me.

3. That from __ (my personal observation) x (information and belief from relatives or others who personally observed) there were representatives from TVA who made statements to myself and husband indicating that after the acquisition of

(our) land a road would be built from Fontana to Bryson City allowing road access for our family to the burial sites of our family.

4. That on xx (my personal observation) __ (information and belief from relatives or others who personally observed) my family was granted a right-of-way, or was supposed to have been granted a right of way in the deed to the extent that our family would temporarily have only walking or water access to the family burial sites until the road from Fontana to Bryson City would be built.

5. That I have received promises, direct or indirect, from representatives of TVA, Congress and other government officials from approximately 1943 until 1982 that such a road which would in part allow us the access we were promised, was going to be built.

6. That at no time have I or others of my family abandoned our access rights in that I and others have continued to visit as best we can our family's graves despite the natural hardships.

7. That the temporary access to the burial sites that was provided in recent years by the government has never been acceptable as a permanent solution by me and was meant only as a temporary resolution of the problem until the road was built.

8. That it was not until 1982 that I learned the road would never be built, or any reasonable facsimile, and therefore decided to seek a legal remedy to this problem.

9. Affiant further sayeth not.

/s/ Millie Marcus Vickery

Subscribed and sworn to before me this 15 day of September, 1983.

/s/ Teresa E. Kuykendall
Notary Public, State of NC

My Commission Expires: August 7, 1985

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants.

A F F I D A V I T

FILED Oct. 11, 1983

Asheville, N. C.

U.S. District Court

Western District of N.C.

1. I, Millie Vickery, have the following relative(s) buried in the following

cemetery(ies):

Name of Relative	Relationship	Cemetery
William Alfonse Marcus	Father*	Cable
JAmelia Marcus Crisp	Sister	Cable

2. That affiant further sayeth not.

/s/ Millie Marcus Vickery

Affiant

Subscribed and sworn before me, this 29 day of Sept. 1983.

/s/ Patricia E. Mills

Notary Public

My Commission expires: 11/12/83

*(Civil War Veteran)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

Civil Action No. B-C-83-172

HELEN VANCE, ET AL.,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants.

A F F I D A V I T

FILED Oct. 11, 1983

Asheville, N. C.

U.S. District Court

Western District of N.C.

STATE OF NORTH CAROLINA

COUNTY OF HAYWOOD

BEFORE ME, the undersigned authority, personally appeared SAMUEL GRAY, who being

by me first duly sworn, deposes and says:

1. That I have a Masters degree in History from the University of North Carolina at Chapel Hill, and I am the Curator of the Mountain Heritage Center with Western Carolina University at Cullowhee, North Carolina.

2. That I work and have worked for six (6) years with the Mountain Heritage Center at the University.

3. That my work and studies in the culture of the Southern Appalachians has led me to conclusions concerning religious customs surrounding cemetery practices.

4. That the mountain inhabitants of North Carolina, Tennessee, Georgia, and South Carolina hold as part of their general world view and understanding of the universe that the area provided for cemeteries and the practice of regular visitation and pilgrimages is sacred and that disassociation in any substantial form deprives them

from fulfilling a religious need and duty.

5. That this conclusion has been derived from information gathered over six years of experience studying, and a lifetime of living in this Appalachian region.

6. Affiant further sayeth not.

/s/ Samuel Gray
SAMUEL GRAY

Subscribed and sworn to before me this 29 day of September, 1983.

/s/ Patricia E. Mills
Notary Public, State of N. C.

My Commission Expires: November 12, 1983

Office - Supreme Court, U.S.
FILED
FEB 8 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-961

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

HELEN S. VANCE, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, who allegedly relied upon a 1943 contract obligating the Department of the Interior to construct a road contingent upon appropriation by Congress of all necessary funds, may, despite the subsequent failure of Congress to make such appropriations, obtain a mandatory injunction compelling the Department to build the road on a theory of "equitable estoppel."

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Crow v. *Gullet*, 541 F. Supp. 785, aff'd, 706 F.2d 856, cert. denied, No. 83-434 (Nov. 7, 1983) 9

Heckler v. *Community Health Services*, No. 83-56 (May 21, 1984) 6, 7-8

Hooe v. *United States*, 218 U.S. 322 8

United States ex rel. TVA v. *Welch*, 327 U.S. 546 ..... 2, 3

Constitution:

U.S. Const. :

Art. I, § 9, Cl. 7 8

Amend. I (Free Exercise Clause) 4-5

Miscellaneous:

Great Smoky Mountains Wilderness Act: Hearings on S. 1947 and S. 2183 Before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources, 98th Cong., 2d Sess. (1984) 4

Page

Miscellaneous—Continued:

H.R. 4262, 98th Cong., 1st Sess. (1983) 4

S. 1947, 98th Cong., 1st Sess. (1983) 4

S. 2183, 98th Cong., 1st Sess. (1983) 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-961

HELEN S. VANCE, ET AL., PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-27a) is reported at 738 F.2d 1418. The opinion of the district court (Pet. App. 32a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1984. A petition for rehearing was denied on September 17, 1984 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, the heirs of deceased persons buried in cemeteries located north of Fontana Lake in Swain County, North Carolina, filed this action in the United States District Court for the Western District of North Carolina in

May 1983. Petitioners claimed that respondents, the Tennessee Valley Authority (TVA), the Department of the Interior, the Secretary of the Interior, the State of North Carolina, and Swain County, have acted to deny vehicular access[1] to the cemeteries in violation of petitioners' contractual, property, and constitutional rights. Petitioners sought to compel TVA to lower the water level in Fontana Lake "sufficiently below State Road 288 to allow free, open and undisturbed access" to the cemeteries (Pet. App. 79a) or, in the alternative, to require the Department of the Interior to construct a road along the north shore of the lake. In addition, petitioners sought the return of the property acquired by TVA in order to build the Fontana Dam to the grantors or their successors in interest (*ibid.*).

The controversy that gave rise to this litigation stems from the construction of the Fontana Dam on the Little Tennessee River. In 1942, Congress, in order to meet pressing power needs for war production, authorized TVA to build the dam. See *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 548 (1946). The cemeteries in question are located on a 44,400-acre tract of land that was acquired by the United States in the 1940's on behalf of TVA in connection with the dam project. The only road access to the cemeteries was obstructed in 1944 when State Road 288 was flooded by water impounded to form Fontana Lake. TVA had offered to have the graves relocated to alternative sites at TVA's expense; however, petitioners and their relatives chose to leave their ancestors' remains in their original location.

In 1943, TVA and the other respondents entered into a written contract as a means of extinguishing TVA's liability for flooding the state highway. The contract, which was

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[1]The National Park Service of the Department of the Interior provides free boat access across Fontana Lake to the burial sites (Pet. App. 47a).

upheld by this Court in *United States ex rel. TVA* v. *Welch, supra,* provided in part that the 44,400 acres would be acquired by TVA and transferred to the National Park Service of the Department of the Interior for inclusion in the Great Smoky Mountains National Park. In return, Interior agreed to construct a road through the park along the north side of Fontana Lake. This road, in conjunction with a connecting public road to be built by the State, would have provided vehicular access to the cemeteries in question. Interior's obligation to build the park road, however, was made expressly contingent on the appropriation of funds by Congress (Pet. App. 7a-8a, 85a-86a):

> The obligation of the Department [of the Interior] to construct or provide for the construction of a Park Road as defined in this Section 4 shall be subject to and contingent in all respects upon the appropriation by Congress of all funds necessary for such construction, and failure on the part of Congress for any reason to make such appropriations shall not constitute a breach or violation of this agreement by the Department or any other party hereto.

The State built the connecting road, and Congress appropriated $6,189,000 through fiscal year 1972 for the park road. Three segments of the park road, totalling 5.6 miles, were completed between 1963 and 1968. Due to serious difficulties encountered during construction, however, it was determined by the Park Service that it would be neither environmentally nor economically feasible to complete the approximately 30-mile long road. No major work on the road has occurred since 1972, and there are presently no unexpended funds appropriated for construction of the project. Pet. App. 8a-9a.[2]

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[2]Although Congress has not appropriated the funds necessary for completion of the park road, three bills were introduced in the 98th Congress that, if passed, would have affected the question of vehicular

Petitioners claim (Pet. 10-11) that it was not until 1982 that they learned that vehicular access to the cemeteries would not be provided. Contending that the failure to construct the park road constituted a breach of contract by Interior, petitioners, claiming to be third-party beneficiaries, sought specific performance of the 1943 contract (Pet. App. 78a). Petitioners further contended that the property acquired by TVA and transferred to Interior in 1948 should be returned to the original grantors or their successors in interest because the conveyances were made in reliance on TVA's representation that vehicular access to the cemeteries would be provided (*id.* at 72a-73a). Finally, petitioners claimed that the denial of road access to the grave sites constituted a deprivation of petitioners' freedom of religion in violation of the First Amendment (*id.* at 73a-74a).

2. The district court dismissed the action, holding that petitioners were only incidental beneficiaries of the 1943 agreement and therefore had no standing to sue under the agreement (Pet. App. 55a-56a). The district court did not specifically address the questions whether petitioners' First

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access to the cemeteries. S. 1947, 98th Cong., 1st Sess. (1983); S. 2183, 98th Cong., 1st Sess. (1983); H.R. 4262, 98th Cong., 1st Sess. (1983). Each bill would have designated the lands in question as part of the National Wilderness Preservation System; however, S. 2183, introduced by Senator Helms of North Carolina, provided that such wilderness designation would not take effect until a ten-foot wide, nonpaved, primitive road was constructed to provide vehicular access to the cemeteries. The bill authorized the appropriation of $950,000 for the road construction. S. 1947, introduced by Senators Baker and Sasser of Tennessee, and H.R. 4262, introduced by Representative Duncan of Tennessee, did not include a provision for a park road but provided instead that boat access to the cemeteries would be continued. See *Great Smoky Mountains Wilderness Act: Hearings on S. 1947 and S. 2183 Before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources*, 98th Cong., 2d Sess. 366-372 (1984) (statement of Russell E. Dickenson, Director, National Park Service).

Amendment rights had been violated or whether Interior's failure to construct the road should cause the deeds of conveyance to be rescinded.[3]

3. A divided panel of the court of appeals affirmed on a different ground, concluding "that whether or not [petitioners] have standing to sue is immaterial, because we find that any agreement to construct a road was never breached" (Pet. App. 13a). The court held that "[b]ecause the 1943 contract so clearly provided that Interior's obligation to construct a road was in *all respects* contingent upon the appropriation of *all necessary funds,* [petitioners] would never be able to demonstrate a breach of agreement" (*id.* at 17a (emphasis in original)). The court also held that petitioners could not assert an estoppel-type argument against respondents based on alleged promises to construct the park road because the 1943 contract "specifically provided that 'failure on the part of Congress *for any reason* to make such appropriations shall not constitute a breach or violation of this agreement by the Department [of the Interior] or any other party hereto' " (*ibid.* (emphasis in original)). The promises and inducements concerning the road's construction allegedly made by government representatives were held by the court to have "at least implicitly incorporated the provisions of the 1943 written contract * * *, including the contingency of a congressional appropriation" (*id.* at 16a (footnote omitted)).[4]

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[3]The district court did, however, note the "drastic" nature of the relief sought, observing that it would cost approximately $19,300,000 to replace the electricity production that would be lost if Fontana Lake were lowered below State Road 228 (Pet. App. 47a-48a). The court also noted that completion of the park road would cost "in the millions of dollars" and would likely result in additional litigation brought by persons opposed to the building of a road in a wilderness area (*id.* at 48a-49a).

[4]Chief Judge Winter dissented (Pet. App. 19a-27a), suggesting that the case should be remanded to the district court for further proceedings

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners contend (Pet. 12-15) that the refusal of the court of appeals to apply the doctrine of equitable estoppel conflicts with decisions of other courts of appeals. That result, however, was not predicated on a holding that estoppel may not in any circumstances run against the government. Instead, the court of appeals merely concluded, in view of the factual record, that "this is not a case where [petitioners] could assert an estoppel-type argument" (Pet. App. 17a). In *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 9, this Court recently held that "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." There is no basis for reviewing the court of appeals' conclusion that petitioners did not meet the traditional requirements for estoppel.

Although petitioners contend that the government promised or misrepresented that the park road would be constructed without regard to the availability of appropriations, it is clear from the face of the complaint that petitioners have no reasonable basis for making such a claim or for asserting (Pet. 20) that "Interior and its TVA

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with respect to whether respondents are obliged to construct an access road based on promises and inducements made independently of the 1943 agreement. He also disagreed with the majority's conclusion that there has been no breach of the 1943 agreement, asserting that Interior breached the contract by failing to seek further appropriations from Congress.

agents grossly misled petitioners or their relatives concerning access to the cemeteries." As noted by the court of appeals (Pet. App. 9a-10a), petitioners specifically alleged in their complaint (*id.* at 65a-66a (emphasis added)):

> That at the time of the acquisition of lands by purchase or condemnation, the acquisition team of the TVA represented to the Plaintiffs or their heirs and others that access to the area purchased would be provided by a newly constructed road and *produced copies of the* [1943] *contract between the government and the people of the State of North Carolina as an enticement or an inducement to sell their lands* and insuring to them access to the area for the purposes of preservating [sic] ingress and egress to the cemeteries in the subject area.

Petitioners thus alleged that they were told about the 1943 agreement and that they were shown copies of it.[5] Petitioners further alleged in their complaint that they "were directly advised, promised, and represented that upon the transfer of their lands and property that their rights of access to the cemeteries would be protected and preserved *by the road hereinabove referred to*" (Pet. App. 72a (emphasis added)). Because the representations concerning the road were, by petitioners' own admission, made with reference to the 1943 contract — including the appropriations contingency clause —the government made no "definite misrepresentation of fact," an essential element of an estoppel claim. *Community Health Services,* slip op. 7

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[5]Petitioners claimed below that they were unsophisticated individuals who would have opted for relocation of the graves had they known of the contingent nature of the 1943 contract. Cf. Pet. 19. The record does not support such a contention; indeed, it is belied by the allegation in the complaint (Exh. A) that the relatives of some 612 deceased persons accepted TVA's offer to relocate graves to other cemeteries having vehicular access.

(quoting Restatement (Second) of Torts § 894(1) (1977)).[6] Petitioners thus have not demonstrated "that the traditional elements of an estoppel are present." *Community Health Services,* slip op. 9.

2. In any event, it is fundamental that no executive department or agency of the government can bind Congress to appropriate money for the construction of any public project. Article I, § 9, Cl. 7 of the Constitution provides that "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." See also *Hooe* v. *United States,* 218 U.S. 322, 334 (1910) ("If an officer, upon his own responsibility and without the authority of Congress, assumes to bind the Government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, the contract is a nullity, so far as the Government is concerned, and no legal obligation arises upon its part to meet its provisions.").

It is undisputed that there are no congressional appropriations available for construction of a park road. Thus, even if petitioners could point to an enforceable contract to construct a road to the cemeteries, there could be no duty on the part of the government to build such a road unless, and until, Congress appropriates the money to do so. Indeed, as comtemplated by Article I, § 9, Cl. 7 of the Constitution, petitioners' proper, and sole, recourse for the relief they seek (vehicular access to the cemeteries) is through the

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[6]The July 31, 1943, letter (Pet. App. 89a-91a), dated one day after the 1943 agreement was executed, likewise cannot support an estoppel claim. The letter, which contained an offer to relocate graves that was *rejected* by petitioners, cannot constitute a "contract" for the construction of a road. In any event, the road referred to in the letter, as found by the court of appeals, is clearly "the road proposed to be built in accordance with the terms of the just executed 1943 contract, including the requirement for congressional funding" (Pet. App. 17a n.5).

legislative process, not in the courts. As previously noted (see note 2, *supra*), Congress is aware of petitioners' concerns but has not acted to provide the relief they seek.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Petitioners' additional arguments require only brief mention. First, petitioners renew their contention that they "have stated a cause of action based on contract" (Pet. 16). In light of the appropriations contingency clause, however, it is clear that there could be no breach of the 1943 contract, even assuming that petitioners have standing to sue under the agreement. Petitioners also claim (Pet. 17-18) that the failure to provide vehicular access constitutes a burden on the practice of their religion. It is undisputed, however, that no one has been denied the right to visit the cemeteries; indeed, it is admitted (Pet. 10) that "[t]he cemeteries have been visited by the petitioners and their relatives since 1943." Because free boat access is provided, see note 1, *supra*, petitioners have not demonstrated that the lack of vehicular access substantially burdens their religious practices. In any event, "the free exercise clause places a duty upon [the government] to keep from prohibiting religious acts, not to provide the means * * * for carrying them out." *Crow* v. *Gullet*, 541 F. Supp. 785, 791 (D.S.D. 1982), aff'd, 706 F.2d 856 (8th Cir. 1983), cert. denied, 464 U.S. 977 (1983).

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